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BURBANK POLICE DEPARTMENT OFFICER GUNN

9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**

12 PRESTON SMITH, an individual;

13 Plaintiff,

14 vs.

16 CITY OF BURBANK; BURBANK
17 POLICE DEPARTMENT;
18 BURBANK POLICE DEPARTMENT
19 OFFICER GUNN; BURBANK
20 POLICE DEPARTMENT OFFICER
21 BAUMGARTEN; BURBANK
22 POLICE DEPARTMENT OFFICER
EDWARDS; AND DOES 1
THROUGH 100, INCLUSIVE

Defendants.

Case No. CV 10-8840 VBF (AGRx)

Honorable Valerie Baker Fairbank

**DEFENDANT GUNN'S ANSWER
TO COMPLAINT; DEMAND FOR
JURY TRIAL**

23 TO THE CLERK OF THE COURT, ALL INTERESTED PARTIES AND
24 THEIR ATTORNEYS OF RECORD:

25 Defendant Burbank Police Department Officer Gunn (hereinafter
26 "Defendant") responds to Plaintiff's Complaint as follows:
27

28 1. In response to Paragraph 7, defendant admits that he is a police

1 officer with the Burbank Police Department, and that with respect to the arrest of
2 plaintiff, was acting within the course and scope of his employment, and under
3 color of law. Except as herein admitted, defendant lacks sufficient information to
4 admit the remaining allegations, and/or deny the allegations, and therefore, the
5 defendant denies the remaining allegations therein.

6 2. In response to Paragraph 8, Defendant admits that he was acting
7 within the course and scope of his employment with the Burbank Police
8 Department. Except as herein admitted, defendant denies.

9 3. In response to Paragraph 9, Defendant admits that Officer
10 Baumgarten is a police officer with the Burbank Police Department, and that with
11 respect to the arrest of plaintiff, was acting within the course and scope of his
12 employment, and under color of law. Except as herein admitted, defendant lacks
13 sufficient information to admit the remaining allegations, and/or denies the
14 allegations, and therefore, the defendant denies the remaining allegations therein.

15 4. In response to Paragraph 10, Defendant admits that Officer
16 Baumgarten was acting within the course and scope of his employment with the
17 Burbank Police Department. Except as herein admitted, defendant denies.

18 5. In response to Paragraph 11, Defendant admits that Officer
19 Baumgarten is a police officer with the Burbank Police Department, and that with
20 respect to the arrest of plaintiff, was acting within the course and scope of his
21 employment, and under color of law. Except as herein admitted, defendant lack
22 sufficient information to admit the remaining allegations, and/or denies the
23 allegations, and therefore, the defendant denies the remaining allegations therein.

24 6. In response to Paragraph 12, Defendant admits that Officer
25 Baumgarten was acting within the course and scope of his employment with the
26 Burbank Police Department. Except as herein admitted, defendant denies.

27 7. In response to Paragraph 13, Defendant admits that plaintiff filed a
28

1 claim which was denied. Except as herein admitted, Defendant denies.

2 8. In response to Paragraph 14, Defendant denies that venue was proper
3 in the Los Angeles Superior Court, Central District, but admits that venue is
4 proper in the Central District of the United States District Court.

5 9. In response to Paragraph 16, Defendant admits that on April 10,
6 2009, Plaintiff was walking with another person when he was approached by
7 Officer Gunn in the vicinity of a liquor store. Except as herein expressly
8 admitted, Defendant lacks sufficient information and belief to enable him to
9 respond.

10 10. In response to Paragraph 17, Defendant admits that he used a taser
11 on plaintiff. Except as herein expressly admitted, Defendant denies.

12 11. In response to Paragraph 19, Defendant admits that after Plaintiff's
13 arrest, he was transported to St. Joseph's Hospital and approved for booking.
14 Except as herein expressly admitted, Defendant denies.

15 12. In response to Paragraphs 4, 5, 6, 21, 22, 43, 50, Defendant admits.

16 13. In response to Paragraphs 1, 2, Defendant lacks sufficient
17 information and belief to respond to this allegation, and on that basis, denies.
18

19 14. In response to Paragraphs 3, 18, 23, 24, 25, 26, 27, 28, 29, 30, 31,
20 32, 33, 34, 35, 36, 38, 29, 40, 41, 44, 45, 46, 47, 48, 50, 51, 52, 53, Defendant
21 denies.

22 15. In response to Paragraphs 15, 20, 37, 42, 49, Defendant incorporates
23 by reference his response to the incorporated paragraphs.
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25
26 **AFFIRMATIVE DEFENSES**

27 **FIRST AFFIRMATIVE DEFENSE**

28 16. Plaintiff's Complaint fails to state a cause of action against these

1 public entity Defendant for, pursuant to Monell v. Department of Social Services
2 of the City of New York, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978),
3 there can be no recovery for a federal civil rights violation where there is no
4 constitutional deprivation occurring pursuant to governmental policy or custom.

5 **SECOND AFFIRMATIVE DEFENSE**

6 17. This individual Defendant is entitled to qualified immunity since
7 there is no constitutional violation on the facts alleged, the applicable law was not
8 clearly established, and reasonable officials in Defendant's position could have
9 believed his conduct was lawful.

10 **THIRD AFFIRMATIVE DEFENSE**

11 18. A conspiracy cannot be generally alleged in an action brought under
12 the Federal Civil Rights Act.

13 **FOURTH AFFIRMATIVE DEFENSE**

14 19. Under the Civil Rights Act, where intent is an element of the claim,
15 the facts must be alleged in the Complaint with specificity.

16 **FIFTH AFFIRMATIVE DEFENSE**

17 20. The Complaint fails to state a cause of action.

18 **SIXTH AFFIRMATIVE DEFENSE**

19 21. Neither a public entity nor a public employee is liable for his act or
20 omission, exercising due care, in the execution or enforcement of any law.

21 **SEVENTH AFFIRMATIVE DEFENSE**

22 22. Neither a public employee nor a public entity is liable for any injury
23 caused by the act or omission of another person.

24 **EIGHTH AFFIRMATIVE DEFENSE**

25 23. Neither a public entity nor a public employee is liable for any injury
26 caused by the institution or prosecution of any judicial proceedings within the
27 scope of the public employee's employment.
28

1 **NINTH AFFIRMATIVE DEFENSE**

2 24. Neither a public entity nor a public employee is liable for any injury
3 resulting from his act or omission where the act or omission was the result of the
4 exercise of the discretion vested in him.

5 **TENTH AFFIRMATIVE DEFENSE**

6 25. Neither a public entity nor its employees are liable for any injury
7 caused by the failure to furnish or obtain medical care for a prisoner in its
8 custody.

9 **ELEVENTH AFFIRMATIVE DEFENSE**

10 26. A public entity is not liable for any injury caused to or by a prisoner.

11 **TWELFTH AFFIRMATIVE DEFENSE**

12 27. Any injury to Plaintiff was due to and caused by the negligence and
13 omissions of the Plaintiff to care for himself, which carelessness and negligence
14 and omissions were the proximate cause of the damage, if any, to the Plaintiff.

15 **THIRTEENTH AFFIRMATIVE DEFENSE**

16 28. The damages, if any, should be in direct proportion to the fault of
17 this Defendant, if any, as provided by Civil Code §§ 1431 to 1431.5.

18 **FOURTEENTH AFFIRMATIVE DEFENSE**

19 29. To the extent that Plaintiff suffered any detriment, such detriment
20 was caused or contributed to by Plaintiff's negligence and damage, if any, should
21 be reduced in direct proportion to his fault.

22 **FIFTEENTH AFFIRMATIVE DEFENSE**

23 30. The negligence of a third-party or parties was a superseding,
24 intervening cause of the Plaintiff's injuries.

25 **SIXTEENTH AFFIRMATIVE DEFENSE**

26 31. Defendant is not liable pursuant to the doctrine of assumption of
27 risk.

1 **SEVENTEENTH AFFIRMATIVE DEFENSE**

2 32. Defendant is immune from liability, pursuant to Government Code
3 § 845.8, since any injuries resulted from a criminal suspect resisting or fleeing
4 from arrest.

5 **EIGHTEENTH AFFIRMATIVE DEFENSE**

6 33. Plaintiff failed to mitigate his damages.

7 **NINETEENTH AFFIRMATIVE DEFENSE**

8 34. Any injury or damage suffered by Plaintiff was caused solely by
9 reason of Plaintiff's wrongful acts and conduct and the willful resistance to a
10 peace officer in the discharge, and attempt to discharge, the duty of his office, and
11 not by reason of any unlawful acts or omissions of this Defendant.

12 **TWENTIETH AFFIRMATIVE DEFENSE**

13 35. The force, if any, used on the Plaintiff was reasonable under the
14 circumstances and that any injury or damages allegedly suffered by Plaintiff were
15 due to and caused by reason of Plaintiff's acts and conduct in the unlawful assault
16 and battery committed by the Plaintiff.

17 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

18 36. Plaintiff knew or should have known that he was being arrested by a
19 peace officer and had the duty to refrain from using force to resist such arrest.

20 **TWENTY-SECOND AFFIRMATIVE DEFENSE**

21 37. To the extent that any force was used in making the arrest, it was
22 privileged as necessary to affect the arrest, to prevent escape, or to overcome
23 resistance.

24 **TWENTY-THIRD AFFIRMATIVE DEFENSE**

25 38. To the extent that any force was used in the incident complained of,
26 it was so used in the exercise of the right of self-defense.

27 **TWENTY-FOURTH AFFIRMATIVE DEFENSE**

28 39. To the extent any force was used, it was privileged as being

1 reasonably necessary, and being believed to be so necessary, to the lawful defense
2 of third parties.

3 **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

4 40. This Defendant had reasonable cause to believe that a public offense
5 was being committed in its presence.

6 **TWENTY-SIXTH AFFIRMATIVE DEFENSE**

7 41. Each of Plaintiff's state law claims is barred by the absolute
8 privilege of Government Code § 821.6.

9 **TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

10 42. Each of Plaintiff's state law claims is barred by the absolute
11 privilege of Government Code § 820.2.

12 **TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

13 43. Neither a public entity nor a public employee is liable for any injury
14 resulting from his act or omission where the act or omission was providing
15 emergency services pursuant to Health and Safety Code §§ 1799.106 and
16 1799.107.

17 **TWENTY-NINTH AFFIRMATIVE DEFENSE**

18 44. This Defendant is immune from liability as a result of its employees
19 providing emergency care at the scene of an emergency pursuant to Health and
20 Safety Code § 1799.102 and Government Code § 815.2.

21 **THIRTIETH AFFIRMATIVE DEFENSE**

22 45. To the extent that this Defendant's employees are certified as set
23 forth in Health and Safety Code § 1799.102, this Defendant is immune from civil
24 liability for damages for emergency field care treatment. Health and Safety Code
25 § 1799.108 and Government Code § 815.2.

26 **THIRTY-FIRST AFFIRMATIVE DEFENSE**

27 46. To the extent that Plaintiff's Complaint alleges negligence based
28 upon the acts of a health care provider, Plaintiff has failed to comply with the

1 notice provisions of Code of Civil Procedure, § 364.

2 **THIRTY-SECOND AFFIRMATIVE DEFENSE**

3 47. As a result of the incident that forms the subject matter of this
4 litigation, Plaintiff was criminally prosecuted and rulings and findings therein are
5 preclusive in the instant action.

6 **THIRTY-THIRD AFFIRMATIVE DEFENSE**

7 48. The Complaint and individual theories of relief set forth therein are
8 barred by Plaintiff's failure to have complied with the California public entity and
9 public employee claims filing provisions.

10 **THIRTY-FOURTH AFFIRMATIVE DEFENSE**

11 49. Plaintiff's claims are barred by the doctrine of unclean hands.

12 **THIRTY-FIFTH AFFIRMATIVE DEFENSE**

13 50. This answering Defendant is not legally responsible for the acts
14 and/or omissions of the DOE Defendants.

15 WHEREFORE, Defendant BURBANK POLICE DEPARTMENT
16 OFFICER GUNN prays that Plaintiff take nothing by way of his Complaint and
17 that this Defendant herein recover their costs and such other and further relief as
18 the Court may deem just and proper.

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DEMAND FOR JURY TRIAL

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that Defendant BURBANK POLICE
DEPARTMENT OFFICER GUNN demands a trial by jury pursuant to Federal
Rules of Civil Procedure, Rule 38(b) and Local Rule
38-1.

Dated: November 23, 2010

LAWRENCE BEACH ALLEN & CHOI, PC

By /s/ Nathan A. Oyster
Nathan A. Oyster
Attorney for Defendant
Burbank Police Department Officer Gunn